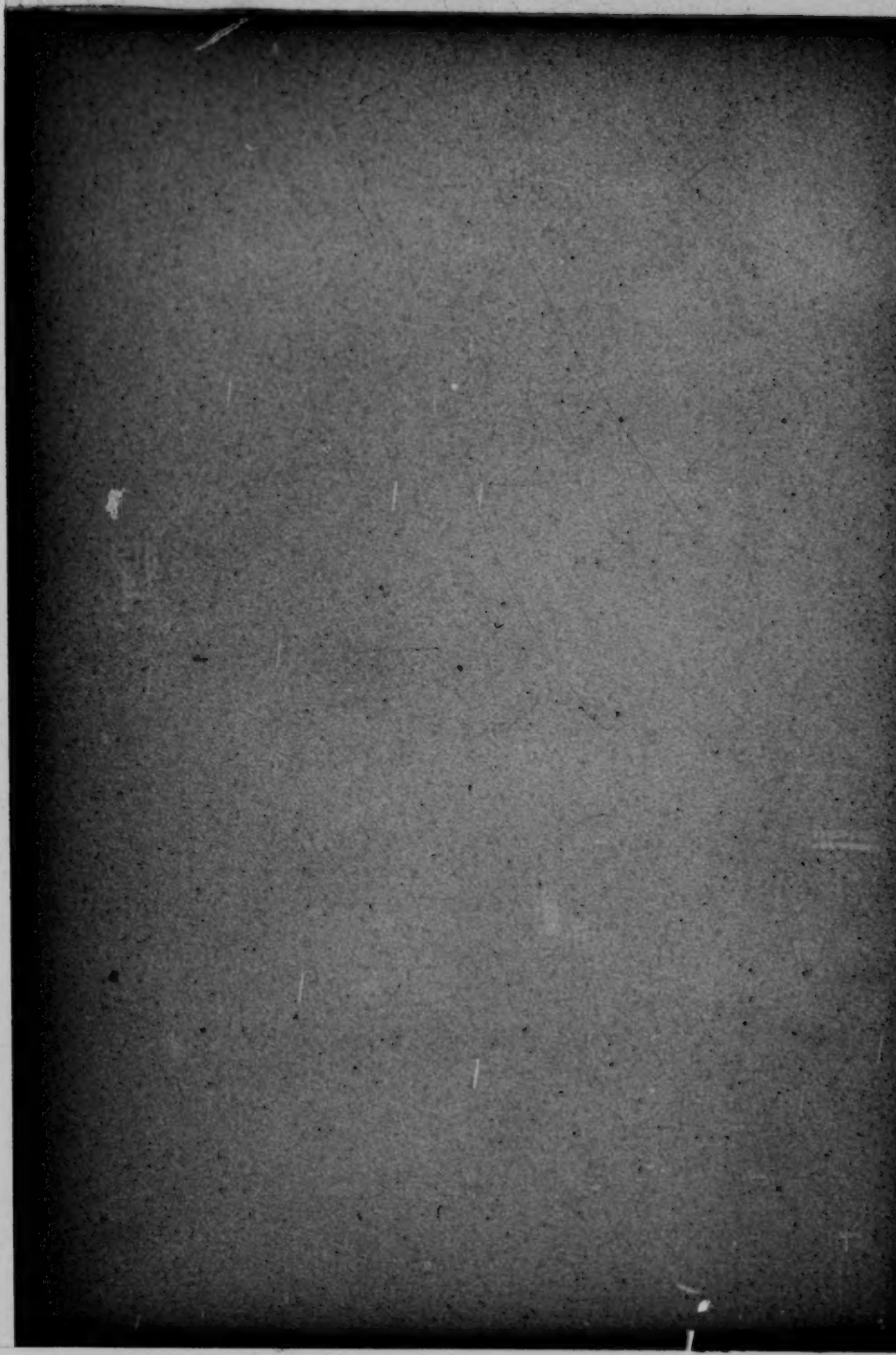

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-887

AMERICAN PARTY OF TEXAS, et al.,
Appellants

v.

BOB BULLOCK
Appellee

NO. 72-942

ROBERT HAINSWORTH,
Appellant

v.

BOB BULLOCK, SECRETARY OF STATE
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 72-887

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Appellee

AMERICAN PARTY OF TEXAS, et al.,
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v.

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LAUREL DUNN, et al.,
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TEXAS NEW PARTY, TEXAS SOCIALIST WORKERS PARTY, et al.,
Appellants

v.

PRESTON SMITH, et al.
Appellees

and

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Appellant

v.

BOB BULLOCK, SECRETARY OF STATE

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

The Appellees respectfully move the Court to dismiss the appeal in these causes on the ground that the appeals do not present substantial federal questions unresolved in the federal courts, and further move the Court, in the alternative, to affirm the judgments sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

A Three-Judge United States District Court for the Western District of Texas, San Antonio Division, on September 15, 1972, entered a Memorandum Opinion and Order, which is yet unpublished, discussing each of the four consolidated complaints and denying all relief requested by the Appellants; a separate Memorandum Order and Opinion was entered by the same Three-Judge Court on September 19, 1972, dismissing the complaint in No. 72-942.

JURISDICTION

The Appellants seek to invoke the jurisdiction of this Court under 42 U.S.C., Section 1971, Section 1981, and Section 1983, and the First, Fourteenth, and Fifteenth Amendments to the Constitution of the United States. A Three-Judge Court was convened pursuant to 28 U.S.C., Section 2281.

STATUTES INVOLVED

Appellants, in No. 72-887, attach relevant portions of the challenged provisions of the Texas Election Code and the McKool-Stroud Primary Financing Law of 1972 as Appendix D to their Jurisdictional Statement at page 44; Mr. Hainsworth, in No. 72-942, sets out challenged Article 13.50 on page 3 of his Jurisdictional Statement.

QUESTIONS PRESENTED

The Appellees will attempt to summarize more specifically the basic questions raised by Appellants in their Jurisdictional Statement on pages 3 and 4, noting that Appellants have abandoned some questions which were ruled upon by the Three-Judge District Court.

1. Are the provisions of Article 13.45(2), which require that before the nominees of any new political party or a political party, whose nominee for governor at the last general election received less than 2% of the total vote cast for governor, or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot, there must be a showing that the number of people participating in the party's precinct conventions or signing petitions to have the party's nominees on the general election ballot was at least 1% of the vote for governor at the last general election, constitutionally impermissible?

2. Are the provisions of Article 13.45(2), which prohibit the circulation of the petitions until the day following the primary elections and prohibit a person from signing such petitions who has participated in any other party's primary election or convention during the current voting year, constitutionally impermissible?

3. Are the provisions of Article 13.45(2), which require that the signatures on the petitions must be secured and filed with the Secretary of State within a 55-day period, constitutionally impermissible?

4. Are the provisions of Article 13.45(2), which require the administering of a prescribed oath to those signing the petition, constitutionally impermissible as being too burdensome?

5. Is the requirement that a person file his intention to become a candidate three months in advance of the precinct conventions so burdensome as to be constitutionally impermissible?

6. Is the Texas Election Code so invidiously discriminatory in not providing absentee balloting for minority and independent candiates as to be constitutionally impermissible?

7. Are the requirements of Article 13.50 as applied to Appellants so burdensome as to be constitutionally impermissible?

8. Whether the McKool-Stroud Primary Financing Bill of 1972 is unconstitutional?

STATEMENT OF THE CASE

Appellees will accept the factual statements of the case related by Appellants in their Jurisdictional Statement but reject the conclusions and opinions contained therein as not being a proper or accurate statement.

THE QUESTIONS AS PROPERLY PRESENTED ARE NOT SUBSTANTIAL

APPELLEES RELY UPON AND CITE FROM THE THREE-JUDGE COURT'S MEMORANDUM OPINION, APPENDIX A (APPELLANT'S JURISDICTIONAL STATEMENT).

Quoted in part, on page 18, as follows:

> "Texas affords four alternative methods of nominating candidates to the ballot for a general election. First, candidates of parties whose gubernatorial candidate polled more than 200,000 votes in the last general election may be nominated by primary election only. Second, candidates of parties whose candidate polled less than 200,000 votes, but more than 2% of the total vote cast for governor, may be nominated by primary election or by nominating convention. Third, candidates of parties whose candidates polled less than 2% of the total gubernatorial vote in the last general election, and parties who did not have a nominee for governor in the last general election, may be nominated by convention only, or by fulfilling additional requirements set out in Article 13.45(2) of the Texas Election Code. Fourth, nonpartisan and independent candidates' names may be printed on the ballot after fulfilling the qualifications set out in Article 13.50 of the Texas Election Code."

Quoted further, in part, from page 19 as follows:

> "Because we believe that Courts should exercise restraint in overturning State laws unless clearly unconstitutional, we find that the totality of the Texas Election Code serves a compelling state interest and does not operate to suffocate the election process."

Quoted further, in part, from page 20 as follows:

> "Defendants move to dismiss the complaints in Raza Unida Party v. Bullock and Socialist Work-

ers Party v. Bullock wherein they challenge Art. 13.45(2) of the Texas Election Code. Defendants argue that plaintiffs in the two suits lack standing, and that their cases are moot, because, after their suits were filed, *the Texas Secretary of State on August 8, 1972, certified that Raza Unida Party and the Socialist Workers Party had complied with the provisions of Art. 13.45(2) and should be placed on the ballot for the November Election. The plaintiffs admit that they could receive no further relief from this Court in this Election year.* Nevertheless, plaintiffs maintain that they are proper parties who continue to present a justiciable 'case or controversy' because excessive funds were spent by them this year in order to comply with the burdensome procedures of the Texas Election Code, and they want assurance that they will not have to repeat the process in the next election year." (Emphasis added.)

Quoted further, in part, from page 24 as follows:

"The State of Texas argues that it has a compelling interest in requiring some minimum amount of support before placing a candidate's name on the ballot and in assuring that all candidates are in fact seeking elective office in good faith. The Court agrees that these are valid state objectives. A review of the decisions since Williams v. Rhodes, supra, leads this Court to conclude that the totality of the scheme required by Article 13.45(2) is not constitutionally impermissible."

Quoted further, in part, from page 26 as follows:

"We agree with the State's contentions. The Courts recognize a state's compelling interest to preserve the integrity of its election process. Under the Texas scheme a voter may exercise the franchise by voting in the primaries or by attending a minority party convention. 'He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in Baker v.

Carr (369 U.S. 186 (1962)).'"

Further, in part, on page 27:

"While the State has shown a valid interest which must be recognized, the plaintiffs have made no showing that these requirements have actually denied to them rights secured by the United States Constitution. We can find nothing in this system which abridges the rights of free speech and association secured by the First and Fourteenth Amendments."

Further, in part, on page 28:

"As the Court aptly stated in Tansley v. Grasso: It may well be that the plaintiffs have strong feelings that this legislative distinction creates an unnecessary burden upon prospective candidates for public office, however, if their claim has any merit their proper forum is before the state legislature. The plaintiffs have shown no invidious discrimination."

ARGUMENT

QUESTION NO. 1

(Restated)

1. Are the provisions of Article 13.45(2), which require that before the nominees of any new political party or a political party, whose nominee for governor at the last general election received less than 2% of the total vote cast for governor, or a previously existing party which did not have a nominee for governor in the last general election, can be placed upon the general election ballot, there must be a showing that the number of people participating in the party's precinct conventions or signing petitions to have the party's nominees on the general election ballot was at least 1% of the vote for governor at the last general election, constitutionally impermissible?

1. Appellees rely upon the holding by the Trial Court that a review of the decisions since *William* v.

Rhodes, 393 U.S. at 32, led the Court to conclude that the totality of the scheme required by Article 13.45(2) is not constitutionally impermissible.

Certainly the minimal 1% required by Texas to show voter support as a condition for ballot position serves a legitimate state objective. *Peoples Party* v. *Tucker*, No. 72-102 (M.D. Pa., June 7, 1972, 270): *Socialist Workers Party* v. *Rhodes*, 318 F.Supp. 1262 (S.D. Ohio, 1970), appeal dism'd, 405 U.S. 949 (1972) (7%); *Jenness* v. *Fortson*, 403 U.S. at 442 (1% to 5%).

QUESTION NO. 2
(Restated)

2. Are the provisions of Article 13.45(2), which prohibit the circulation of the petitions until the day following the primary elections and prohibit a person from signing such petitions who has participated in any other party's primary election or convention during the current voting year, constitutionally impermissible?

2. Appellees argue that the requirement that a new party hold a precinct convention on primary day affords that party an equal opportunity with all other parties to attract the voter to its political process. Thus, if the party has at least 1% support, and the people attend the convention, there is no need for the petition requirement at all. Additionally, if the petitions are circulated well in advance of the precinct conventions and primary elections, a voter may sign before another party's position has crystallized and the voter would be precluded from changing his mind. Further, Appellees argue that by delaying the petition circulating process until after the primary election, there is less chance that individual voters will become confused or engage in the party process of more than

one party. The Three-Judge District Court agreed that existing Supreme Court cases follow the Appellees argument. *Baker* v. *Carr*, 369 U.S. 186 (1962); *Jackson* v. *Ogilvie*, 325 F.Supp. at 867; *Lippitt* v. *Cipillon*, 404 U.S. 1032 (1972).

QUESTION NO. 3

(Restated)

3. Are the provisions of Article 13.45(2), which require that the signatures on the petitions must be secured and filed with the Secretary of State within a 55-day period, constitutionally impermissible?

3. Appellees argued in the Trial Brief submitted to the Trial Court in support of the requirement that a new party circulate and obtain within a 55-day period (120 days before the general election) the required signatures to be filed with the Secretary of State, the following:

a) a failure to obtain the required 1% at precinct conventions, and in the 55 days thereafter by petition, indicates that the political party involved lacks political support or initiative.

The Court agreed that the requirements are not to be unduly burdensome due to the fact that two of the minor political parties were able to obtain a place on the ballot by fully complying with provisions of the Texas Election Code.

b) a cut-off period of 120 days is necessary in order for the Secretary of State to check the validity of the signatures on the petitions in sufficient time to allow time for printing of the ballot and for any legal contests which may arise. *Fergerson* v. *Williams*, 343 F.Supp. 654, 656 (N.D. Miss. 1972).

QUESTION NO. 4
(Restated)

4. Are the provisions of Article 13.45(2), which require the administering of a prescribed oath to those signing the petition, constitutionally impermissible as being too burdensome?

4. The requirement under Article 13.45(2) for the administration of a prescribed oath before a Notary to those signing the petitions serves a compelling interest to insure that participants in one party's nominating process do not participate in anothers. In arguments before the Trial Court, Counsel for Raza Unida Party admitted that the oath and notary requirements did not hinder their efforts to secure signatures. Further, the oath enables the state to enforce its criminal penalties against cross-over voting and apprise the voters of these possible penalties.

QUESTION NO. 5
(Restated)

5. Is the requirement that a person file his intention to become a candidate three months in advance of the precinct conventions so burdensome as to be constitutionally impermissible?

5. The requirement of the Texas Election Code that all persons seeking elective office file on the same date is valid and constitutional, and Appellants' contentions that such requirement is violative of equal protection and due process are without merit. *Socialist Workers Party* v. *Rhodes*, 318 F.Supp. 1262, (S.D. Ohio 1970); *Gilligan* v. *Sweetenham*, 405 U.S. 949 (1972).

QUESTION NO. 6
(Restated)

6. Is the Texas Election Code so invidiously discriminatory in not providing absentee balloting

for minority and independent candidates as to be constitutionally impermissible?

In *McDonald* v. *Board of Elections*, 394 U.S. 802, 807, 809, 811, absentee vallot legislation was treated as remedial legislation designed to extend the franchise to those who had previously been unable to exercise it. The Court stated that such legislation should not be invalidated merely because the legislature failed to cover persons who might benefit from it. Also, *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

QUESTION NO. 7
(Restated)

7. Are the requirements of Article 13.50 as applied to Appellants so burdensome as to be constitutionally impermissible?

The Court stated in its Memorandum Opinion (Appendix A, Appellants' Jurisdictional Statement) that:

> "We reject outright Plaintiffs' argument that states can impose no additional election requirements other than those found in the United States Constitution."

Appellants presented no factual basis in support of their general allegation that the provisions of Article 13.50 are "unduly burdensome" as to them. They admitted in oral arguments that they made no attempt to comply with the provisions of Article 13.50.

The Court correctly held that the requirements of Article 13.50 serve a compelling state interest and do not operate to suffocate the election process and are not violative of Equal Protection under the Fourteenth Amendment. *Bullock* v. *Carter*, 405 U.S. at 145, 146.

QUESTION NO. 8
(Restated)

8. Whether the McKool-Stroud Primary Fi-

nancing Bill of 1972 is unconstitutional?

8. The McKool-Stroud Act was passed to provide financing for party primaries after the Supreme Court held that the Texas filing fee requirements were unconstitutional in *Bullock* v. *Carter*, supra. The Act provides that the State of Texas will finance the primary elections of only those political parties casting 200,000 or more votes for governor in the last preceding general election.

When a minority party reaches a size where they are forced to conduct party primary elections under the provisions of the Texas Election Code, they will then be entitled to be the recipients of the State's financial assistance. Such an arrangement is constitutionally permissible.

CONCLUSION

Appellee respectfully submits that the Jurisdictional Statement of Appellants presents no substantial federal questions not unresolved by prior decisions in the federal courts, and that the authorities cited and argument given by Appellees manifestly shows that the questions raised are so unsubstantial as not to require further argument.

Appellee therefore respectfully moves the Court to dismiss the appeals or, in the alternative, to affirm the judgments entered in these causes by the Three-Judge District Court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Sam L. Jones, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion to Dismiss or Affirm has been forwarded by United States Mail, First Class, postage pre-paid to the attorney for the American Party of Texas and Laurel N. Dunn: Gloria T. Svanas, 418 West Fourth Street, Odessa, Texas 79761; the attorney for the Texas New Party and Texas Socialist Workers Party: Michael Anthony Maness, 410 Houston Bar Center, 723 Main Street, Houston, Texas 77002; and Mr. Robert W. Hainsworth, Alvin Building, 3710 Holman Avenue, Houston, Texas 77004.

SAM L. JONES, JR.